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356-541—69

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 219

REIES LOPEZ TIJERINA, CRISTOBAL LOPEZ TIJERINA, AND JERRY NOLL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 434 Misc.

EZEKIAL DOMINGUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 436 Misc.

ALFONSO CHAVEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE PETITIONS FOR WRITS OF CERTIORARI

OPINION BELOW

The opinion of the court of appeals is reported at 407 F. 2d 349.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 1969. A petition for rehearing or rehearing en banc was denied on April 10, 1969. Mr. Justice White extended the time for filing the petitions for writs of certiorari to June 9, 1969. On that date the petitions in numbers 219 and 484 Misc. were filed. The petition in number 436 Misc. was filed on June 10, 1969, and is out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the indictment was sufficient to charge the offense of assaulting Forest Rangers in the performance of their official duties, in violation of 18 U.S.C. 111.

2. Whether the Forest Rangers were properly found to be within the scope of 18 U.S.C. 111, which punishes assaults upon various classes of federal officers designated in 18 U.S.C. 1114.

3. Whether the evidence was sufficient to show that petitioners Noll and Reies Tijerina aided and abetted in the assaults on the Forest Rangers.

4. Whether the instructions of the trial court on specific intent constituted plain error.

5. Whether the instructions correctly stated the elements of the crime of conversion of government property.

STATEMENT

After a jury trial in the United States District Court for the District of New Mexico, petitioners were convicted on one or more counts of an indictment charging assault upon Forest Rangers, in violation of 18 U.S.C. 111, and converting government trucks, in violation of 18 U.S.C. 641. Specifically, petitioner Reies Tijerina (hereafter Reies) was convicted on counts 1 and 2 alleging assault of Forest Rangers Taylor and Smith; petitioner Cristobal Tijerina (hereafter Cristobal) was convicted of assaulting Forest Ranger Taylor; petitioners Noll and Chavez were convicted on both assault counts and on two further counts, each of which charged conversion of a government truck. Petitioners received varying sentences of imprisonment, set forth at Pet. App. 3 n. 2.[1] The court of appeals affirmed (Pet. App. A).

The events in question arose out of a demonstration held at the Echo Amphitheatre Camp Ground in the Carson National Forest, New Mexico, on October 22, 1966. The demonstration was arranged by an organization known as Alianza Federal de Mercedes, of which Reies was the leader, to publicize the claims of a group of Spanish Americans to property rights which they asserted had been guaranteed by the 1848 Treaty of Guadalupe Hidalgo between the United States and Mexico (9 Stat. 922). Reies notified newsmen in advance of the scheduled "occupation," and reporters and photographers were present at the

[1] All references designated "Pet." or "Pet. App." are to the petition in No. 219.

scene. Films of the incidents which occurred were introduced into evidence (see P. Exs. 17 and 18).

On October 22, 1966, a caravan of vehicles carrying about three hundred people approached the entrance to the Echo Camp where some forty members of the Alianza had been gathered since early morning. Forest Rangers Taylor and Smith, who were unarmed and in uniform, attempted to stop the cars and collect the established entrance fee. The cars, however, sped past without stopping, forcing the Rangers to jump out of the way without collecting the entrance fees (Tr. 662–664, 724, 727, 810, 813).[2] Once inside the Camp Ground, the crowd became hostile and threatening toward the two Rangers. Amidst shouts, in Spanish, of "kill him" and "hang him," Rangers Taylor and Smith were violently seized[3] and pushed and dragged to a picnic table; the film in evidence shows Reies pointing to the table as this was going on (Tr. 668–669, 720–721, 814, 822, see Tr. 1195). Noll was sitting at the table. Acting as judge,[4] he charged the two officers with trespassing and being a nuisance, and told them to get out and stay out of the Echo Camp (Tr. 672, 676, 822–823). During these proceedings, Reies was standing on the table; when a reporter asked why the Rangers were arrested, he replied "On

[2] "Tr." refers to the transcript of proceedings at trial, a copy of which is on file with the Clerk of this Court in connection with the petition in No. 219.

[3] Ranger Taylor was grabbed by Cristobal and Chavez. Shortly thereafter, Ranger Smith was seized by Dominguez and Chavez (Tr. 668, 814).

[4] Noll had been "elected" judge a week before (Tr. 1149).

the order of the town" and "[f]or trespassing on the property of the town" (Tr. 1203). During the "trial," Captain Vigil of the New Mexico State Police approached Reies and asked what he wanted with the Rangers. Reies replied "publicity" (Tr. 673). Then Captain Vigil asked whether the Rangers were being held against their will or were free to go and Reies answered "They are free to go now" (Tr. 673).

After the Rangers were released, they started to take down license numbers. They were seized again and told by Reies that they would be rearrested if they did not leave. The Rangers were not allowed to take their trucks; Chavez informed them that the trucks had been impounded on Noll's order. Subsequently, Noll said they could take their personal belongings but not the trucks (Tr. 674–676, 823–824). The Rangers departed. The entrance to the camp ground was guarded by men with guns, and a flag and signs were put up proclaiming the spot to be a Spanish Republic (Tr. 825–827, 1150–1151). While Reies was talking with Captain Vigil, Ranger Smith came up to report that the trucks had been impounded (Tr. 782). Noll admitted this but, when Reies said he did not want them held, said he would release them. Cristobal then produced a set of keys, and another person produced the Rangers' walkie-talkie (Tr. 782–783). The Rangers' supervisor declined to permit them to take the trucks at this time, however, out of fear of the still angry and unruly crowd (Tr. 678–679, 781–784, 793–794, 1331–1334). The trucks were recovered, undamaged, after the crowd left. Chavez and

Dominguez each wore a deputy's badge and Cristobal had a deputy's card (Tr. 1224, 1227, 1251, 1306).

ARGUMENT

1. Petitioners contend that counts 1 and 2 of the indictment, which charged assault, failed to set forth all the elements of the offense charged. Count 1 reads:

> On or about the 22nd day of October 1966, at Echo Amphitheatre Camp Ground, Carson National Forest, Rio Arriba County, in the state and District of New Mexico, the defendants * * * willfully did forcibly assault, resist, oppose, impede, intimidate, and interfere with Walter Taylor, an officer of the Forest Service, United States Department of Agriculture, knowing him to be such officer, while the said Walter Taylor was engaged in the performance of his official duties. In violation of 18 U.S.C. 111 and 18 U.S.C. 2.

Count 2 charged the same offense, in the same language, as to Ranger Smith.

18 U.S.C. 111 protects any federal officer "designated in section 1114 of this title" against assault "while engaged in or on account of the performance of his official duties." Section 1114's coverage includes "any officer or employee of the Department of Agriculture * * * designated by the Secretary of Agriculture * * * to enforce any Act of Congress for the protection, preservation, or restoration of game and other wild birds and animals." Petitioners argue that the indictment did not set forth a necessary element of the offense under 18 U.S.C. 111, because it did not allege that the Forest

Rangers were employees described by Section 1114 or that, at the time of the incidents, they were engaged in the duties described in that Section. As the court of appeals held, however (Pet. App. A 8), the indictment was "a plain, concise and definite written statement of the essential facts constituting the offense charged" within the meaning of Fed. R. Crim. P. 7(c), adequate to meet this Court's two tests for sufficiency of indictments: (1) to apprise the accused of the nature of the offense alleged so that he may prepare a defense; and (2) to insure that in the event a future similar charge is brought, the courts will be able accurately to assess the defendant's claim of double jeopardy. *United States* v. *Debrow*, 346 U.S. 374, 376; see also *Russell* v. *United States*, 369 U.S. 749, 765–769. The details of the Rangers' appointments and duties were matters of proof which did not have to be alleged in the indictment.[5]

2. Petitioners also argue that Forest Rangers are not officers "designated in section 1114." The Secretary of Agriculture designated all officers and employees of the Forest Service assigned to field duty "to enforce Acts of Congress, and regulations promulgated pursuant thereto, for the protection, preservation, or restoration of game and other wild birds and animals on lands under the jurisdiction of the Forest Service" on August 20, 1940, 5 Fed Reg. 2940. That

[5] As the court of appeals noted (Pet. App. A 8), the government furnished a bill of particulars to petitioners stating the official duties of the Rangers. The court expressly found that "no bill of particulars was needed to save the indictment" (*ibid.*).

designation has never been revoked. Petitioners' principal contention is that it is nonetheless ineffective because both the Bureau of Biological Survey and the "functions of the Secretary of Agriculture relating to the conservation of wild life, game, and migratory birds" had been transferred to the Secretary of the Interior under the 1939 Congressional Reorganization Plan No. II (53 Stat. 1433–1434). Petitioners assert that the Secretary of Agriculture thus had no authority to designate those employees in 1940, when he purported to do so.

As the court below reasoned (Pet. App. A 9–10), however, the statutory predecessor of Section 1114 on which the Secretary of Agriculture based his designation, 54 Stat. 391, was enacted *after* passage of Reorganization Plan No. II. That statute—identical in all pertinent respects to Section 1114—clearly reflected a congressional understanding that the Secretary of Agriculture shares the responsibility for the "protection, preservation, [and] restoration of game and other wild birds and animals" with the Secretary of the Interior. As officers of the Forest Service, Forest Rangers are under the aegis of the Agriculture Department, 16 U.S.C. 551 *et seq.*, and subject to the regulations it has adopted (36 C.F.R. 200 *et seq.*)—in part, to carry out conservation tasks. Thus, the Forest Rangers in this case were within the coverage of Section 1114. "For the protection of the National Forest and the preservation of wild life therein * * * they acted officially to enforce the Land and

Water Conservation Fund Act of 1965, 16 U.S.C. §§ 460 (*l*)–4 to (*l*)–11, the Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. §§ 528–531, and the regulations thereunder. Among their duties was the collection of the entrance fee at Echo." Pet. App. A 10.[6]

Petitioners also urge that Congress intended by 18 U.S.C. 111 and 1114 to protect only federal investigative and law enforcement personnel of the United States government, and that the 1940 designation—by embracing all Forest Service employees outside of Washington, D.C., including clerks and typists—is impermissibly broad. But Section 1114 clearly recognizes, as within the coverage of 18 U.S.C. 111, any person designated by the Secretary of Agriculture to "enforce any Act of Congress for the protection, preservation, or restoration of game and other wild birds and animals." Field employees of the Forest Service are so designated. 5 Fed. Reg. 2940. Whatever may be the status of clerks, there can be no question but that the designation of the Forest Rangers themselves falls well within the intended purview of the congressional authorization.

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[6] The scope of the Rangers' duties was established by the government at trial. See P. Exs. 13 and 14. The trial judge properly charged that, if the jury found that the officers had been designated by the Secretary of Agriculture to enforce statutes relating to the conservation of wildlife, *and* that at the time of the incidents here involved the Rangers were carrying out those designated duties, the Rangers were within the coverage of 18 U.S.C. 111 and 1114. This instruction did not deprive the jury of its historic function to make the relevant factual determinations as to whether the Rangers were acting in the performance of their official duties as described in Section 1114.

3. Petitioners Reies and Noll contend (Pet. 13–19) that the evidence was insufficient to convict them for aiding and abetting the assaults on the two Rangers.

Petitioners state (Pet. 9) that "[n]o government witness saw any of the defendants as part of this caravan," but Reies himself testified that he held the caravan three or four miles south of Echo until he was sure the National Guard was not there (Tr. 1146, 1190). Moreover, the films show Reies directing the crowd where to take the officers, *i.e.*, to the table where Noll was acting as judge. The jury could reasonably find that Noll, in assuming the function of a judge, and Reies, in directing where the Rangers were to be brought by persons purporting to act as "deputies," were acting pursuant to a deliberate plan for the seizure and "trial" of the Rangers for the purpose which Reies stated to Captain Vigil, *i.e.*, publicity. These specific actions were ample to justify their convictions as aiders and abetters although neither personally touched the officers. See *Nye & Nissen* v. *United States*, 336 U.S. 613, 619. There was ample basis for declining to credit these petitioners' claim that they were merely trying to protect the Rangers. Obviously, the assault and seizure of the Rangers cannot be justified on First Amendment grounds.[7]

4. All petitioners challenge the trial court's instructions on specific intent, with reference to all

[7] We do not understand the other petitioners to dispute the sufficiency of the evidence on the assault counts; it showed that they had seized the Rangers and dragged them to the table where Noll and Reies were waiting.

counts on which they were convicted. The trial judge had charged (Tr. 1511–1512):

> Generally, it is reasonable to infer that a person ordinarily intends all the natural and probable consequences of acts knowingly done. So, unless the evidence in the case leads you to a different or contrary conclusion, you may draw the inference and find that the defendant intended all of the natural and probable consequences which one, standing in like circumstances and possessing like knowledge, should reasonably have expected to result from any act proven to your satisfaction to have been done—* * *.

As the court of appeals recognized (Pet. App. A 13), the above instruction has been criticized, and in some circumstances has been held to constitute error warranting reversal because of its possible effect on the jury with respect to the burden of proof. See cases cited at Pet. App. A 13 n. 20.

The instances in which the instruction has been held to be misleading are generally those where intent is not inherent in the act itself. Thus, the most frequent criticism has come in cases of income tax evasion where the act of failing to file a return or filing of an understated return might be attributable to negligence. *E.g., Bloch* v. *United States*, 221 F.2d 786 (C.A. 9); *Wardlaw* v. *United States*, 203 F.2d 884 (C.A. 5). Seizing and dragging an officer to a "trial table" is not such an equivocal act, even as to the two defendants—Reies and Noll—who were charged with aiding and abetting the assault. The judge specifically

told the jury that it could not find any defendant guilty solely because he was present and may have known that an offense was being committed. He charged that to be an aider and abettor a defendant must have participated in the venture willfully, as something he wished to bring about, and must have sought by his action to make it succeed (Tr. 1502). Moreover, immediately prior to the giving of the now challenged instruction, the trial judge correctly defined specific intent as knowingly to do an act which the law forbids, "intending with bad purpose either to disobey or disregard the law." He also correctly instructed that the burden of proof was on the government to prove the intent of each defendant individually beyond a reasonable doubt (Tr. 1511). Under these facts, giving the instruction did not amount to plain error.

5. Petitioners Noll and Chavez, who were convicted on both counts charging conversion of government property, contend that the trial court's instructions were deficient as to the essential elements of this offense. The trial court charged the jury that the term "convert[s] to his own use" means "to take personal property owned by another, and to knowingly and wrongfully deprive the owner of possession thereof" (Tr. 1501). Petitioners Noll and Chavez objected that this instruction omitted to charge that there must have been "some serious interference with * * * the possession" (Tr. 1521–1523), which they claim to be an essential element of the offense. The evidence is clear that the trucks were originally "im-

pounded" under the purported authority of Noll; that the keys were taken away; and that the Rangers were forbidden to take the trucks with them when they left. Having kept the Rangers from using the trucks, Noll's subsequent recantation (at Reies' direction) was no more effective to erase his offense than would be the act of a thief returning booty over a garden wall.

Moreover, the cases make clear that the intentional withholding of another's rightful use of a chattel, as here, may constitute an actionable conversion in tort even if there is no taking, removal or transfer. See Prosser, *The Nature of Conversion,* 42 Cornell L.Q. 168, 180–182 and cases cited; *Morissette* v. *United States,* 342 U.S. 246, 271–272. It is true that in tort law, where the remedy is damages, the interference with property must be sufficiently serious to justify a judgment that the *"actor * * * be required to pay the other the full value of the chattel."* See Prosser, *The Nature of Conversion,* 42 Cornell L.Q. 168, 173–174, and examples 37–39 at pages 180–181 (1957). There is, however, no reason to carry that concept over into the criminal field, where damage is relevant, if at all, only to the question of sentence.

In any event, the remarks of the judge on sentencing make it clear that he imposed sentences on the basis of the incident as a whole, with primary emphasis on the assault (Tr. 1656–1657). Taking into consideration the prior record of each defendant and his part in the proceeding, the court imposed substantial sentences on Noll and Reies Tijerina (Tr. 1658–1660) and a mild sentence on Chavez, equivalent to that of

Dominguez—who was not involved in the conversion (Tr. 1661–1662). It is evident that the convictions for conversion did not affect the sentence and the court below need not have reached those counts. Cf. *Benton* v. *Maryland*, No. 201, O.T., 1968, decided June 23, 1969.

CONCLUSION

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
ROGER A. PAULEY,
Attorneys.

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